# Nabors Drilling (Labuan) Corp v Lembaga Perkhidmatan Kewangan Labuan

HIGH COURT (LABUAN) — JUDICIAL REVIEW NO LBN-13NCvC-1/11 OF 2015
RAVINTHRAN J
8 JANUARY 2018

*Civil Procedure — Judicial review — Application for — Application to quash decision of respondent not to give retrospective approval to leasing transaction — Applicant sought declaration that guidelines under which decision was made was ultra vires, unlawful, null and void — Whether guidelines under which decision was made contravened Labuan Companies Act 1990 — Whether guidelines had force of law — Whether decision of respondent was unreasonable*

*Evidence — Affidavit — Affidavit evidence — Paragraph and exhibit in respondent's affidavit — Whether evidence relevant to the issue at hand — Whether paragraph and exhibit should be expunged*

The main application by the applicant was the judicial review application to quash the decision of the respondent not to give retrospective approval to a leasing transaction; and a declaration that the Guidelines for Carrying on Offshore Leasing Business in Labuan 2003 ('the Guidelines') under which the decision was made was ultra vires, unlawful, null and void. The second application was the application in encl 28 to expunge two paragraphs (6(h) and 6(i)) of the affidavit of Iskandar @ Benjamin bin Mohd Nuli @ Nuli which was filed on behalf of the respondent to oppose the judicial review application. The applicant was a leasing company that was registered under the Labuan Companies Act 1990 ('the LCA'). The respondent ('the Labuan FSA') was set up under the Labuan Financial Services Authority Act 1996 ('the LFSAA'). Section 4 of the LFSAA gave further powers to the respondent to not only administer and enforce the provisions of the LFSAA but also other laws stated in the schedule ('the Labuan laws'). The respondent had initially granted approval to the applicant to lease an oil rig to a Malaysian resident ('NMSB') subject to the condition that the applicant 'complies with the relevant Acts, legislations and guidelines issued by Labuan FSA at all times'. The Labuan Financial Services and Securities Regulation 2010 ('the LFSSR') stipulated a fee of RM60,000 for approval of single leasing transaction with a resident and a fee of RM20,000 for a subsequent transaction with a Malaysian resident. However, no fee was required for approval of a leasing transaction with a non-resident under LFSSR. The applicant entered into a subsequent leasing transaction with NMSB without the approval of the respondent and without

paying any leasing fees under the LFSSR. The applicant belatedly applied for approval some twenty months later and the respondent rejected the application. The respondent issued a show cause notice to the applicant. As the explanation of the applicant did not commend itself to the respondent, the applicant was ordered to pay an administrative penalty of RM10,000. The applicant again asked for approval for the subsequent leasing transaction. The respondent granted approval vide a letter dated 9 April 2015 and stated that the approval had no retrospective effect as it was effective only from the date of the letter. The issues for consideration were: (a) whether section 8.2 of the Guidelines under which the approval for the subsequent leasing transaction considered by the respondent was in the first place unlawful and void as it contravene the LCA; (b) whether the Guidelines had the force of law; and (c) whether the decision of the respondent was unreasonable.

**Held,** dismissing the application for judicial review and allowing encl 28:

(1) Merely because an averment mentioned a scandalous fact did not make the averment itself scandalous. The fact that the solicitors of the applicant had been consulted to give comments some years ago on the draft Guidelines had nothing to do with the matter at hand. The facts underlying this case had not even arisen at that time and that the solicitors had not yet been instructed in the matter. Therefore, the averment in para 6(i) was thoroughly irrelevant to the determination of the main issue in this case which was the legality of the said Guidelines. Paragraph 6(i) and exh LFSA5 were expunged (see paras 16–17).

(2) There was no inconsistency with the third schedule of the LFSSR or section 8.2 of the Guidelines. The argument that the Guidelines did not have the force of law was not tenable. The requirement by the respondent in section 8.2 of the Guidelines for approval to be obtained for a subsequent leasing transaction fell squarely under the authority of the respondent to issue guidelines not only to clarify Labuan laws but also under 'any other matters relating to Labuan financial services'. The applicant had accepted the leasing licence with conditions and one of the conditions was that it must comply with the Guidelines and the LFSSR. Thus, the applicant could not now seek relief to overturn the conditions stated in the licence (see paras 33 & 37).

(3) The Guidelines which was the basis for the respondent's decision to require the applicant to apply for approval for the subsequent leasing transaction was not illegal and did not contradict primary legislation. The question of illegality did not arise as the requirement to obtain approval as stipulated in the Guidelines and the payment for fee for the approval in the LFSSR was valid and did not contradict s 7(6) of the LCA. The court was not prepared to hold that the decision of the respondent to refuse retrospective approval was one that so unreasonable

that no reasonable person acting reasonably could have made it. The applicant delayed by as much as twenty months which was certainly inordinate by any measure. Hence, the decision in the letter dated 9 April 2015 to refuse retrospective approval and the imposition of the administrative penalty could not be deemed unreasonable exercise of administrative power (see paras 38 & 40).

**[Bahasa Malaysia summary**

Permohonan utama oleh pemohon adalah permohonan semakan kehakiman untuk membatalkan keputusan responden untuk tidak memberikan kelulusan retrospektif kepada transaksi pemajakan; dan satu deklarasi bahawa Garis Panduan untuk Menjalankan Perniagaan Pemajakan Luar Pesisir di Labuan 2003 ('Garis Panduan') di mana keputusan dibuat adalah ultra vires, menyalahi undang-undang, batal dan tidak sah. Permohonan kedua adalah permohonan dalam lampiran 28 untuk menghapuskan dua perenggan (6(h) dan 6(i)) afidavit Iskandar @ Benjamin bin Mohd Nuli @ Nuli yang difailkan bagi pihak responden untuk menentang permohonan semakan kehakiman. Pemohon adalah syarikat pemajakan yang didaftarkan di bawah Akta Syarikat Labuan 1990 ('ASL'). Responden ('Labuan FSA') ditubuhkan di bawah Akta Lembaga Perkhidmatan Kewangan Labuan 1996 ('ALPKL'). Seksyen 4 ALPKL memberi kuasa selanjutnya kepada responden untuk tidak hanya mentadbir dan menguatkuasakan peruntukan ALPKL tetapi juga undang-undang lain yang dinyatakan dalam jadual ('undang-undang Labuan'). Responden pada mulanya telah memberi kelulusan kepada pemohon untuk memajak pelantar minyak kepada penduduk Malaysia ('NMSB') tertakluk kepada syarat bahawa pemohon 'mematuhi Akta, perundangan dan garis panduan yang berkaitan yang dikeluarkan oleh Labuan FSA pada setiap masa'. Peraturan-peraturan Perkhidmatan Kewangan dan Sekuriti Labuan 2010 ('PPKSL') menetapkan yuran sebanyak RM60,000 untuk kelulusan transaksi pemajakan tunggal dengan pemastautin dan bayaran sebanyak RM20,000 untuk urusniaga berikutnya dengan pemastautin Malaysia. Walau bagaimanapun, tiada bayaran diperlukan untuk kelulusan transaksi pajakan dengan bukan pemastautin di bawah PPKSL. Pemohon memasuki transaksi pemajakan yang berikutnya dengan NMSB tanpa kelulusan responden dan tanpa membayar sebarang yuran pemajakan di bawah PPKSL. Pemohon terlambat memohon untuk kelulusan kira-kira dua puluh bulan kemudian dan responden menolak permohonan itu. Responden mengeluarkan notis tunjuk sebab kepada pemohon. Memandangkan penjelasan pemohon tidak memperakukan diri sendiri kepada responden, pemohon telah diperintahkan untuk membayar denda pentadbiran sebanyak RM10,000. Pemohon sekali lagi meminta kelulusan untuk transaksi pemajakan berikutnya. Responden memberikan kelulusan melalui surat bertarikh 9 April 2015 dan menyatakan bahawa kelulusan itu tidak mempunyai kesan retrospektif memandangkan ia hanya berkuat kuasa dari tarikh surat itu. Isu-isu untuk pertimbangan adalah: (a) sama ada seksyen 8.2

Garis Panduan di mana kelulusan bagi transaksi pemajakan yang berikutnya yang dipertimbangkan oleh responden adalah pada mulanya menyalahi undang-undang dan tidak sah kerana ia bertentangan dengan ASL; (b) sama ada Garis Panduan mempunyai kuasa undang-undang; dan (c) sama ada keputusan responden tidak munasabah.

**Diputuskan**, menolak permohonan untuk semakan kehakiman dan membenarkan lampiran 28:

(1) Hanya semata-mata kerana satu kenyataan menyebut fakta berbentuk skandal tidak membuat persoalan itu sendiri berbentuk skandal. Hakikat bahawa peguam pemohon telah berunding untuk memberikan komen beberapa tahun yang lalu pada draf Garis Panduan tiada kaitan dengan perkara itu. Fakta-fakta yang mendasari kes ini tidak pernah timbul pada masa itu dan bahawa peguam-peguam belum diberi arahan dalam perkara itu. Oleh itu, pernyataan dalam perenggan 6(i) adalah tidak relevan dengan penentuan isu utama dalam hal ini yang merupakan kesahihan Garis Panduan tersebut. Perenggan 6(i) dan eksh LFSA5 telah dihapuskan (lihat perenggan 16–17).

(2) Tiada ketidakkonsistenan dengan jadual ketiga PPKSL atau seksyen 8.2 Garis Panduan. Hujahan bahawa Garis Panduan tidak mempunyai kekuatan undang-undang tidak boleh dipertahankan. Keperluan oleh responden dalam seksyen 8.2 Garis Panduan bagi kelulusan untuk diperolehi untuk transaksi pemajakan berikutnya jatuh tepat di bawah kuasa responden untuk mengeluarkan garis panduan bukan sahaja untuk menjelaskan undang-undang Labuan tetapi juga di bawah 'sebarang perkara lain yang berkaitan dengan perkhidmatan kewangan Labuan'. Pemohon telah menerima lesen pemajakan dengan syarat dan salah satu syaratnya adalah bahawa ia mesti mematuhi Garis Panduan dan PPKSL. Oleh itu, pemohon tidak boleh memohon relief untuk membatalkan syarat-syarat yang dinyatakan dalam lesen (lihat perenggan 33 & 37).

(3) Garis Panduan yang menjadi asas bagi keputusan responden untuk menghendaki pemohon untuk memohon kelulusan untuk transaksi pemajakan berikutnya tidak menyalahi undang-undang dan tidak bercanggah dengan perundangan utama. Persoalan mengenai tidak sah tidak timbul kerana syarat untuk mendapatkan kelulusan sebagaimana yang ditetapkan dalam Garis Panduan dan bayaran untuk bayaran untuk kelulusan dalam PPKSL adalah sah dan tidak bertentangan dengan s 7(6) ASL. Mahkamah tidak bersedia untuk memutuskan bahawa keputusan responden untuk menolak kelulusan retrospektif adalah salah satu yang tidak munasabah bahawa tiada orang munasabah yang bertindak dengan munasabah boleh membuatnya. Pemohon tertangguh sebanyak dua puluh bulan yang pastinya keterlaluan oleh sebarang tindakan. Oleh itu, keputusan dalam surat bertarikh 9 April 2015 untuk menolak kelulusan

retrospektif dan pengenaan denda pentadbiran tidak dapat dianggap sebagai kuasa pentadbiran yang tidak munasabah (lihat perenggan 38 & 40).]

**Notes**

For cases on affidavit evidence, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 574–589.

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

**Cases referred to**

*Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521, HC (refd)

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223, CA (refd)

*Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374, HL (refd)

*Diana Chee Vun Hsai v Citibank Bhd* [2009] 5 MLJ 643; [2009] 6 CLJ 774, HC (refd)

*Mohamed Moidu bin Mohammed & Anor v Hassan bin Kadir & Ors* [1997] MLJU 31, HC (refd)

*Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460, CA (refd)

**Legislation referred to**

Banking and Financial Institutions Act 1989 (repealed by the Financial Services Act 2013) s 126

Exchange Control Act 1953 s 43

Interpretation Acts 1948 and 1967 ss 3, 40

Labuan Business Activity Tax Act 1990

Labuan Companies Act 1990 ss 7, 7(1), (2), (3), (4), (5), (6), (6)(a)

Labuan Financial Services Authority Act 1996 ss 3(2), 4, 4A

Labuan Financial Services and Securities Act 2010 ss 87, 90, 92, 189, 196

Labuan Financial Services and Securities Regulation 2010

Labuan Foundations Act 2010

Labuan Islamic Financial Services and Securities Act 2010

Labuan Limited Partnerships and Limited Liability Partnerships Act 2010

Labuan Trusts Act 1996

Payments Systems Act 2003 s 70

*Mohd Arief Emran (Kellie Yap with him) (Wong & Partners) for the applicant.*
*William Lim (Nur Izzati with him) (AR & C) for the respondent.*

**Ravinthran J:**

INTRODUCTION

**[1]** There are two applications before me. The main application is the judicial review application to quash the decision of the respondent not to give retrospective approval to a leasing transaction. The applicant also prayed for a declaration that the 'Guidelines' under which the decision was made is unlawful. I had initially refused leave for this application on ground of delay on 26 January 2016. Upon the successful appeal of the applicant against this decision, the Court of Appeal remitted the judicial review application to this court for hearing on the merits.

**[2]** The second application before me is the application in encl 28. It is an application by the applicant to expunge two paras (6(h) and 6(i)) of the affidavit of Iskandar @ Benjamin bin Mohd Nuli @ Nuli affirmed on 31 March 2017 which was filed on behalf of the respondent to oppose the instant judicial review application. I heard both applications together and gave decision together. Hence, this judgment shall constitute my grounds of decision for the main judicial review application and the expunction application in encl 28.

BACKGROUND FACTS

**[3]** The applicant is a leasing company that is registered under the Labuan Companies Act 1990 ('the LCA'). Thus, it is a 'Labuan Company'. The respondent (known by its acronym Labuan FSA) was set up under the Labuan Financial Services Authority Act 1996 ('the LFSAA 1996'). Section 3(2) of the LFSSA 1996 enacts that the respondent is the central regulatory, supervisory and enforcement authority of the international business and financial services industry in Labuan. Section 4 gives further powers to the respondent. It provides that the respondent may administer and enforce not only the provisions of LFSAA 1996 but also other laws stated in the schedule which are:

(a) Labuan Companies Act 1990 (Act 441);

(b) Labuan Business Activity Tax Act 1990 (Act 445);

(c) Labuan Trusts Act 1996 (Act 554);

(d) Labuan Foundations Act 2010 (Act 706);

(e) Labuan Islamic Financial Services and Securities Act 2010 (Act 705);

(f) Labuan Limited Partnerships and Limited Liability Partnerships Act 2010 (Act 707); and

(g) Labuan Financial Services and Securities Act 2010 (Act 704).

**[4]** For sake of convenience, I shall collectively refer to the above laws as the Labuan laws. The applicant without a doubt comes within the supervisory and regulatory reach of the respondent. It is a 'Labuan company'. Furthermore, it had been granted a licence by the respondent under s 92 of the Labuan Financial Services and Securities Act 2010 ('the LFSSA 2010') to carry on leasing business.

**[5]** The decision of the respondent that aggrieved the applicant is related to the lease of an oil rig. The respondent had initially granted approval to the applicant to lease an oil rig known as Rig 488 to a Malaysian resident ('NMSB') on 13 July 2011. The letter of the respondent granting approval stated that the said approval is subject to the condition that the applicant 'complies with the relevant Acts, legislations and guidelines issued by Labuan FSA at all times'. The Labuan Financial Services and Securities Regulation 2010 ('the LFSS Regulations') stipulates a fee of RM60,000 for approval of single leasing transaction with a resident and a fee of RM20,000 for a subsequent transaction with a Malaysian resident. However, no fee is required for approval of a leasing transaction with a non-resident under LFSSR. The applicant had applied for approval of the leasing transaction with a Malaysian resident, namely NMSB in respect of Rig 488 and paid the requisite fee. Thus, there is no issue in respect of Rig 488.

**[6]** However, the applicant entered into a subsequent leasing transaction ('the subsequent leasing transaction') with NMSB in respect of Rig 503 without the approval of the respondent and without paying any leasing fees under the LFSSR. The applicant belatedly applied for approval vide letter dated 28 October 2013 some twenty months later. The respondent rejected the application on 6 May 2014 and informed the applicant that the subsequent leasing transaction 'should not be deemed as Labuan business activity and any income derived from the transaction should not be taxed under the Labuan Business Activity Tax Act 1990. Under the Labuan Business Activity Tax Act 1990 ('the LBATA'), the applicant can avail tax benefits if a particular leasing transaction is deemed a 'Labuan business activity'.

**[7]** On 7 May 2014, the respondent issued a show cause notice to the applicant. As the explanation of the applicant did not commend itself to the respondent, the applicant was ordered to pay an administrative penalty of RM10,000 vide letter dated 27 June 2014. However, on 23 September 2014, the applicant through its agent (Deloitte) requested the respondent to 'reconsider granting the approval' for the 'subsequent leasing transaction'. This request was rejected by the respondent on 16 December 2014.

**[8]** On 26 February 2015, the applicant asked for approval for the 'subsequent leasing transaction' again. In the letter dated 9 April 2015, the

respondent granted approval for the 'subsequent leasing transaction'. However, the letter stated that the approval has no retrospective effect as it was effective only from the date of the letter. The applicant was also asked to pay a fee of RM20,000 if it wished to accept the approval. The applicant accepted the approval and paid the fee of RM20,000.

**[9]** The quantum of the fees payable for a leasing transaction with a resident is stated in the LFSS Regulations. The requirement to obtain the approval of the respondent for leasing transactions is stated in section 8.2 of the 'Guidelines for Carrying on Offshore Leasing Business in Labuan 2003' ('the Guidelines').

PRAYERS SOUGHT BY THE APPLICANT

**[10]** In the initial leave application, the applicant sought to quash the decision of the respondent found in its letters dated 6 May 2014 and 27 May 2014. The decisions in these letters are referred in the submissions of the parties as decision 3 and decision 2. However, at the leave stage, the application to challenge the decisions contained in these letters were abandoned when prayers (2) and (6) were withdrawn. The applicant is now seeking to quash the decision contained in letter dated 9 April 2015 and at the same time is applying to obtain a declaration that the Guidelines are null and void.

**[11]** The full list of remaining remedies sought by the applicant in this judicial review application are:

(a) an order of certiorari to remove into the High Court for the purpose of it being quashed the decision of the respondent published and notified to the applicant as contained in the letter dated 9 April 2015 (decision 1);

(b) a declaration that the decision is unreasonable, unlawful, null and void;

(c) a declaration that item 8.2 of the Guidelines on the Establishment & Operations of Labuan Leasing Business runs contrary to s 7(6) of the Labuan Companies Act 1990 and is therefore ultra vires, unlawful, null and void;

(d) a declaration that the Guidelines do not have the force of law and serves only to clarify requirements under the Labuan Financial Services and Securities Act 2010 ('the LFSSA');

(e) a declaration that since the applicant is licensed to carry on a leasing business in Labuan by virtue of ss 87 and 90 of the LFSSA, the transaction between the applicant and NDIL Malaysia Sdn Bhd for Rig 503 is a Labuan business activity for the purpose of the Labuan Business Activity Tax Act 1990;

(f) costs; and

(g) such further, alternative, consequential or other relief.

ISSUES

**[12]** The decision contained in the letter dated 9 April 2015 is the approval of the respondent for the 'subsequent leasing transaction' effective from the date of the letter. That letter also states that the approval cannot be regarded as retrospective. The applicant has pleaded that this decision is unreasonable, unlawful and void. The applicant further argued that section 8.2 of the 'Guidelines' under which the approval for the 'subsequent leasing transaction' was considered by the respondent was in the first place unlawful and void as it contravened the Labuan Companies Act 1990. Thus, the principal issues would be:

(a) whether section 8.2 of the Guidelines contravene the LCA?

(b) whether the Guidelines have the force of law? and

(c) whether the decision of the respondent was unreasonable?

ENCLOSURE 28 — DECISION

**[13]** In encl 28, the applicant is applying to strike out paras 6(h) and 6(i) of the respondent's affidavit affirmed by Iskandar Benjamin bin Mohd Nuli @ Nuli on 31 March 2017 and the exhibits related to those paragraphs, namely 'LFSA4 and LFSA5'. The ground of the application is that the said paragraphs are irrelevant and are embarrassing and unfair to the applicant.

**[14]** The said paragraphs relate to the act of the respondent to seek comments from the stakeholders in the industry. In para 6(h), the deponent stated that at the drafting stage, the respondent circulated the draft 'Guidelines' to various stakeholders in the industry including the solicitors of the applicant. The said letter to the stakeholders enclosing the 'Guidelines' is exhibited as LFSA4.

**[15]** However, at the hearing of encl 22, counsel for applicant indicated that he is only applying to expunge para 6(1) and LFSA5. In para 6(i), the deponent stated as follows:

> 6(1) In fact, the Applicant's solicitors, Messrs Wong & Partners, also provided their comments on the Draft 'Guidelines' vide their letter dated 23.5.2013. Interestingly, in their letter dated 23.5.203, the Applicant solicitors did not dispute the Respondent's powers/authority to issue guidelines that require approved Labuan leasing company to obtain approval and pay a fee for every subsequent leasing transaction entered with Malaysian residents. Instead, the Applicant's solicitors

> endorsed the same and had further proposed 'that 'new leasing transaction' means a new leasing contract/agreement, excluding agreements entered into to introduce amendments or addendums to pre-approved leasing contracts or agreement which LFSA had previously approved ...'. This casts doubt on the accuracy and/or veracity of the advice given by the Applicant's solicitors in the Applicants Affidavit.

The said letter of Wong & Partners is exhibited as LFSA5.

**[16]** I agree with counsel for respondent that merely because an averment mentions a scandalous fact does not make the averment itself scandalous (see *Mohamed Moidu bin Mohammed & Anor v Hassan bin Kadir & Ors* [1997] MLJU 31). However, in the instant case, the fact that the solicitors of the applicant had been consulted to give comments some years ago on the draft 'Guidelines' has nothing to do with the matter at hand. The solicitors are a separate entity from the client they represent. It must be presumed that the facts underlying the instant case had not even arisen at that time and that the solicitors had not yet been instructed in the matter. Therefore, I am of the view that the averment in para 6(i) is thoroughly irrelevant to the determination of the main issue in this case which is the legality of the said 'Guidelines'. As stated in *Mohamed Moidu Bin Mohammed & Another v Hassan Bin Kadir & Ors*, the relevant question to ask is whether objectionable evidence has any relevance to the issue at hand. The full passage in the above-mentioned judgment is as follows:

> A general jurisdiction is accorded to the court to expunge scandalous matter in any record or proceeding (*Re Miller* 54 LJ Ch 205). Allegations of dishonesty and outrageous conduct itemised in the statement of claim are not scandalous so long as they are relevant to the issue at hand (*Rubery v Grant* LR 13 Eq 443). Brett LJ in *Millington v Loving* 6 QBD p 196 remarked, quite correctly, that: 'The mere fact that these paragraphs state a scandalous fact does not make them scandalous'. What is pertinent to ask is this: Whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief claimed: *Christie v Christie* LR 8 Ch p 503; and *Whitney v Moignard* (1890) 24 QBD 630.

**[17]** As the comments of the solicitors of the applicant on the draft 'Guidelines' are irrelevant to the issues in this application, I shall expunge para 6(i) and exh LFSA5 of the affidavit of Iskandar Benjamin bin Mohd Nuli @ Nuli dated 31 March 2017

## DECISION ON JUDICIAL REVIEW APPLICATION

*'Guidelines'*

**[18]** The respondent had been granting approval for leasing transactions

under section 8.2 of the Guidelines on the Establishment and Operations of the Labuan Leasing Business. It reads as follows:

> 8.2. Subsequent leasing transactions with Malaysian residents are subject to Labuan FSA's prior approval and payment of subsequent transaction fee.

**[19]** The 'Guidelines' are issued by the respondent under s 4A of the LFSAA 1996. The provision reads as follows:

> 4A Power to issue guidelines
>
> (1) The Authority may, in respect of this Act or the laws specified in the Schedule or any other matter relating to Labuan financial services, issue guidelines to clarify any provision of this Act or the laws specified in the Schedule to facilitate compliance with the law by a Labuan financial institution or any other matters relating to Labuan financial services.
>
> (2) The Authority may amend or revoke any guideline issued under this section.

**[20]** Counsel for applicant's argument is that section 8.2 of the 'Guidelines' contradicts s 7(6) of the LCA 1990 and is therefore ultra vires. Section 7(5) of the LCA 1990 generally provides that a Labuan company that carries on business with 'a resident' shall notify the respondent of any transactions within ten working days of the transaction. However, eight exceptions are provided in sub-s (6). Counsel for applicant submitted that the applicant's transaction in question fell under the first exception in s 7(6)(a) which reads as follows:

> (a) the Labuan company carries on any licensed activity with a resident under the Labuan Financial Services and Securities Act 2010 or the Labuan Islamic Financial Services and Securities Act 2010.

**[21]** It is common ground that the applicant is a company that had been licensed to carry on leasing business under the LFSSA 2010. Therefore, under s 7(6)(a) of the LCA 1990, there is no requirement to notify the respondent about leasing transactions carried out in Labuan with a resident. Counsel for applicant argued that for this reason, the imposition of the requirement by section 8.2 of the 'Guidelines' on Labuan companies to obtain approval for subsequent leasing transactions with a resident is unlawful. Thus, he relied on the 'illegality' ground of judicial review to quash 'decision 1' and obtain a declaration that the 'Guidelines' are null and void (see *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374).

**[22]** Counsel for applicant also referred to the previous position in various Labuan legislations that did not permit offshore companies to transact business with resident companies. This is because the original purpose was to permit Labuan companies to trade with international companies only. He urged the

court to consider the fact that since 1990 there has been gradual liberalisation of the laws and the latest position is manifested in s 7(6) of the LCA 1990 which has done away with the requirement for notification if the Labuan company 'carries on licensed activity with a resident' as happened in this case.

**[23]** In para 41 of his written submissions, counsel for applicant conceded that the respondent as the licensing authority can impose conditions to the licence issued to the applicant. In the instant case, one of the conditions is compliance with the 'Guidelines' and the Regulations. However, the essential argument of counsel for applicant is that the conditions cannot contravene s 7(6) of the LCA 1990.

**[24]** He argued that by requiring approval from the respondent, s 7(6) of the LCA had been breached in that the respondent had added to the requirements stipulated by Parliament in the primary legislation. Thus, he submitted that the applicant should not have been asked to obtain approval from the respondent for the subsequent leasing transaction.

**[25]** The arguments of counsel for the respondent on this point may be summarised as follows. Counsel for respondent submitted that s 7(5) and 7(6) of the LCA 1990 deal with general notification of all transactions of a Labuan company with a resident. However, the third schedule of the LFSS Regulations made under s 196 of the LFSSA 2010 by the Minister stipulates for collection of fees for 'approval of a single leasing transaction' with a Malaysian resident and for 'approval of a subsequent leasing transaction'. Counsel for respondent submitted that the 'Guidelines' were made to clarify Labuan laws including matters related to financial services. As fees for 'approval' had been provided in the LFSS Regulations, the 'Guidelines' had clarified the necessity of obtaining approval for the 'Subsequent Leasing Transaction'. Furthermore, he submitted that the applicant cannot deny liability to pay fees as compliance with the 'Guidelines' is one of the conditions of the leasing licence. He also cited s 40 of the Interpretation Act that says that the power to grant a licence includes the power to impose conditions.

**[26]** In my opinion, the 'Guidelines' are not inconsistent with s 7(6) of the LCA 1990 or any other Labuan Laws. My reasons are as follows.

**[27]** 'Resident' in the LCA 1990 means:

(a) in relation to a natural person, a citizen or permanent resident of Malaysia; or

(b) in relation to any other person, a person who has established a place of business, and is operating, in Malaysia, and includes a person who is

declared to be a resident pursuant to s 43 of the Exchange Control Act 1953 (Act 17).

**[28]** Section 7(1) says that a Labuan company may only carry out business in Labuan. Section 7(2) permits a Labuan company to carry on business with a resident. However, under s 7(3) it cannot offer its shares to a resident in Malaysia other than in Labuan. It also cannot carry on business in Ringgit unless the transaction comes with the exceptions stated in s 7(4). I shall now consider s 7(5) and (6) of the LCA which read as follows:

> (5) Where a Labuan company carries on a business with a resident, the Labuan company shall notify the Authority of any transactions between the Labuan company and the resident within ten working days of such transactions.
>
> (6) Notwithstanding subsection (5), a Labuan company is not required to notify the Authority of transactions between the Labuan company and the resident where —
>
> (a) the Labuan company carries on any licensed activity with a resident under the Labuan Financial Services and Securities Act 2010 or the Labuan Islamic Financial Services and Securities Act 2010;
>
> (b) the Labuan company makes or maintains deposits with a person carrying on a business within Malaysia;
>
> (c) the Labuan company makes or maintains a professional contact with any counsel, attorney, accountant, book-keeper, Labuan trust company or a corporation wholly owned by a Labuan trust company made available by the Labuan trust company to act or be appointed as a resident director or a resident secretary of a Labuan company, management company, investment adviser or other similar person carrying on business within Malaysia;
>
> (d) the Labuan company prepares or maintains books and records within Malaysia;
>
> (e) the Labuan company holds, within Malaysia, meetings of its directors or members;
>
> (f) the Labuan company acquires or holds any lease of any property for the purposes of its operation or as accommodation for its officers or employees;
>
> (g) the Labuan company holds shares, debt obligations or other securities in a company incorporated under this Act or in a domestic company, or holds shares, debt obligations or other securities including shares and any property provided as collateral to secure any borrowing for the purposes of a transaction entered into in the ordinary course of business in connection with the lending of money; or
>
> (h) a resident of Malaysia holds shares in that Labuan company.

**[29]** It must be noted that the above provisions are general provisions in

respect of a Labuan company's limitations in carrying on business with a resident. Section 7 does not deal specifically with a Labuan company that has a leasing licence. It is thus a general provision about the limitations of a Labuan company and the exemption from notifying the respondent about the transactions done in respect of licensed activity. The licensed activity is not confined to the leasing business alone. It is stated in general terms.

**[30]** On the other hand, LFSS Regulations 2010 specifically deal with collection of fees 'upon approval of a leasing transaction' and 'a subsequent leasing transaction' in the third schedule. Section 189 of the parent legislation (LFSSA 2010) authorise the respondent to collect fees. The section is broadly worded and reads as follows:

> 189 Annual and licence fees
>
> (1) The Authority may prescribe such annual, licence or registration fees by regulations in respect of the activities of a licensed or registered entity or other activities under this Act.
>
> (2) Such fees as may be prescribed shall be payable on or before 15 January of every year following the year in which any consent, licence or registration is granted.

I reproduce the relevant portion of the schedule of the LFSS Regulations below:

| | |
|---|---|
| (iv) leasing business — | |
| (A) upon approval of a single transaction with a Malaysian resident: | USD20,000/RM60,000 |
| (B) upon approval of a subsequent transaction with a Malaysian resident: | USD60,000/RM20,000 |
| (C) upon approval for leasing business transacted with non-Malaysian resident: | Nil |

**[31]** Section 8.2 of the 'Guidelines' categorically states that for leasing transactions, approval of the respondent is required for a subsequent leasing transaction. The authority to collect fees for a subsequent leasing transaction with a resident is already provided in the third schedule of the LFSS Regulations 2010. On the other hand, s 7(6) of the LCA 1990 merely provides generally that for any licensed activity, notification is not required in respect of transactions with a resident. In the premises, I am of the view, that section 8.2 of the 'Guidelines' does not contradict s 7(6) of the LCA 1990.

WHETHER THE 'GUIDELINES' HAS THE FORCE OF LAW?

**[32]** Counsel for the applicant submitted that in any event the 'Guidelines' cannot be equated with subsidiary legislation and does not have the force of

law. He said that 'Guidelines' was not made by the Minister but are merely guidelines issued by the respondent to clarify the provisions of the written law. He submitted that 'there is no consistent manner that one can read section 8.2 of the 'Guidelines' as 'clarifying' the third schedule of the Regulations. In any event, he submitted that the Regulations and 'Guidelines' 'stands in direct opposition with any interpretation' that requires notification or approval of leasing transaction. He said that 'upon approval' in the third schedule of the LFSS Regulations is inconsistent with the LCA 1990 and therefore is void to the extent of the inconsistency.

**[33]** I have already addressed the question of inconsistency with s 7(6) of the LCA 1990 and found that there is no inconsistency with the third schedule of the LFSS Regulations 2010 or section 8.2 of the 'Guidelines'. The only question is whether the 'Guidelines' has the force of law in that it can be relied upon by respondent to require approval for the 'subsequent leasing transaction' and collect fees. I agree with counsel for the respondent that 'Guidelines' have the force of law and therefore must be obeyed unless it contradicts primary legislation. My reasons are as follows.

**[34]** I shall firstly observe that it has been stated in numerous cases that the court is not prevented from looking beyond labels ascribed to documents, positions, relationships, or as in this case, the so-called 'guidelines'. The true nature of a thing must be determined by reference to legal principles alone without being constrained by the label given.

**[35]** The 'Guidelines' in the instant case were made by the respondent pursuant to the power conferred to it under the enabling provision of the LFSAA 1996 to clarify any provision of the Labuan Laws. The definition of subsidiary legislation in s 3 of the Interpretation Acts 1948 and 1967 (Act 388) is as follows:

> 'subsidiary legislation' — means any proclamation, rule, regulation, order notification, by-law or other instrument made under any Act, Enactment,
>
> Ordinance or other lawful authority and having legislative effect;

**[36]** There are a number of instruments which are not labelled as Regulations or Rules made under enabling provisions of written laws that courts have held to have legislative effect. These cases were cited by counsel for respondent. In *Diana Chee Vun Hsai v Citibank Bhd* [2009] 5 MLJ 643; [2009] 6 CLJ 774, Mohamed Apandi Ali J (as he then was) said that the *Bank Negara Credit Card Guidelines* issued by Bank Negara under the enabling provision of s 70 of the Payments Systems Act 2003 is a piece of subsidiary legislation notwithstanding the fact it is labelled 'guidelines' and that it was not made by the Minister. His Lordship cited the case of *Affin Bank Bhd v Datuk*

*Ahmad Zahid bin Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521 where Abdul Malik Ishak J held that the *Bank Negara Guidelines* made under s 126 of the Banking and Financial Institutions Act 1989 has the force of law. Counsel for respondent also cited the case of *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460 where the Court of Appeal held that the Inspector-General's Standing Orders ('IGSO') has the force of law.

**[37]** In my opinion, the argument that the 'Guidelines' do not have the force of law is not tenable. Section 4A of the LFSAA 1996 which I reproduced earlier says that the respondent has power to issue guidelines 'to clarify any provision' of the Labuan Laws or 'any other matters relating to Labuan financial services'. It is not disputed that the respondent is the central regulatory, supervisory and enforcement authority insofar as Labuan's function as the international business and financial services centre is concerned. For this reason, the respondent has also been empowered to enforce all Labuan Laws. This function includes issuing licences, including leasing licences as discussed earlier. In the premises, the requirement by the respondent in section 8.2 of the 'Guidelines' for approval to be obtained for a subsequent leasing transaction' falls squarely under the authority of the respondent to issue guidelines not only to clarify Labuan Laws but also under 'any other matters relating to Labuan financial services'. It stands to reason that a regulatory authority that is statutorily empowered by Parliament should be allowed to issue guidelines and collects fees in respect of its function. In fact, s 4 of the LFSAA 1996 allows the respondent to impose fees and other charges to carry out its function and powers effectively. In any event, even if the argument that the 'Guidelines' do not have the force of law is accepted, in the instant case, the applicant had accepted the leasing licence with conditions and one of the conditions is that it must comply with the 'Guidelines' and the LFSS Regulations. In the premises, the applicant cannot now seek relief to overturn the conditions stated in the licence.

WHETHER RESPONDENT ACTED UNREASONABLY?

**[38]** Counsel for applicant submitted that the cornerstone of the judicial review application was 'illegality'. However, for reasons given earlier, I found that the 'Guidelines' which is the basis for the respondent's decision to require the applicant to apply for approval for the 'subsequent leasing transaction' is not illegal and does not contradict primary legislation.

**[39]** However, counsel for applicant also submitted the decision of the respondent was unreasonable because it granted approval only for a timeline that is irrelevant to the applicant. In other words, essential complaint is that the respondent did not grant the retrospective approval that was sought by the applicant. The applicant had made a belated application for approval for the

period between 22 May 2012–22 May 2014. However, the approval granted in the letter dated 9 April 2015 was approval for the period commencing from the date of the letter. As stated earlier, the respondent had demanded approval fee of RM20,000 as per the LFSS Regulations and also imposed an administrative penalty for the late application. Counsel for applicant again submitted that the requirement for approval is not sanctioned by the law in view of s 7(6) of the LCA 1990.

**[40]** I would reiterate that for reasons given earlier, the question of illegality does not arise as I found that the requirement to obtain approval as stipulated in the 'Guidelines' and the payment for fee for the approval in the LFSS Regulations is valid and does not contradict s 7(6) of the LCA 1990. In respect of the question of reasonableness, I am not prepared to hold that the decision of the respondent to refuse retrospective approval is one that so unreasonable that no reasonable person acting reasonably could have made it (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680; [1948] 1 KB 223). Section 8.2 of the 'Guidelines' clearly require the applicant to apply for approval for subsequent leasing transactions. In the instant case, the applicant delayed by as much as twenty months which is certainly inordinate by any measure.

Before issuing the impugned decision in the letter dated 9 April 2015, the respondent had refused the application for retrospective approval in letters dated 6 May 2014 and 16 December 2014. In the premises, the decision in letter dated 9 April 2015 to refuse retrospective approval and the imposition of the administrative penalty cannot be deemed unreasonable exercise of administrative power in the *Wednesbury* sense.

CONCLUSION

**[41]** The case of the applicant that the refusal to grant retrospective approval, the imposition of fees and administrative penalty and the decision not to recognise that the leasing transaction in question was 'Labuan business activity' were bad were all hinged on the argument that section 8.2 of the 'Guidelines' had contradicted principal legislation namely s 7(6) of the LCA 1990. As I found that the 'Guidelines' were validly made and are not ultra vires the powers of the respondent under Labuan laws, the application for judicial review must necessarily be dismissed. The applicant is ordered to pay costs of RM10,000 to the respondent which shall be subject to payment of allocatur. In respect of the expunction application (encl 28), the respondent is ordered to pay costs of RM5,000 to the applicant which shall be subject to payment of allocatur.

*Application for judicial review dismissed and encl 28 allowed.*

Reported by Ahmad Ismail Illman Mohd Razali